

**STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE
45 Fremont Street, 24th Floor
San Francisco, California 94105**

**NOTICE OF PROPOSED ACTION AND
NOTICE OF PUBLIC HEARING**

Date: April 7, 2006

RH02023855

SUBJECT OF PROPOSED HEARING

The Insurance Commissioner proposes to adopt a regulation which will explain, clarify and implement the viatical settlement provisions of California Insurance Code, sections 10113.1 and 10113.2. This adoption will occur only after the Commissioner considers all comments, objections and recommendations regarding the proposed regulation. If adopted, this regulation will add Article 12.9, including new sections 2548.1 through 2548.8, to Title 10, Chapter 5, Subchapter 3, of the California Code of Regulations ("C.C.R.").

PUBLIC HEARING DATE AND LOCATION:

A public hearing will be held to permit all interested persons the opportunity to present statements or arguments, orally or in writing, with respect to the proposed regulation at the following date, time and place:

**Date and time: Friday, June 9, 2006
 10:00 a.m.**

**Location: California Department of Insurance
 45 Fremont Street, Floor 22 Hearing Room
 San Francisco, CA 94105**

Access to hearing rooms:

The building and room to be used for the public hearing are accessible to persons with mobility impairments. Persons with sight or hearing impairments are requested to notify the primary contact person (listed below) in order to make special arrangements, if necessary.

PRESENTATION OF WRITTEN COMMENTS

A person may submit written comments without, or in addition to, attending the public hearing. Written comments and questions should be addressed to the below primary contact person.

Primary contact person

Jennifer Chambers, Senior Staff Counsel
California Department of Insurance
45 Fremont Street, Floor 24
San Francisco, CA 94105
Telephone: (415) 538-4145
Facsimile: (415) 904-5729

Backup contact person

George Teekell, Staff Counsel
California Department of Insurance
45 Fremont Street, Floor 21
San Francisco, CA 94105
Telephone: (415) 538-4390
Facsimile: (415) 904-5490

Deadline for written comments

All written materials must be received by the Insurance Commissioner, addressed to the primary contact person at the address listed above, no later than 5:00 p.m. on June 9, 2006. Any written materials received after that time will not be considered.

Comments transmitted by E-mail or Facsimile

The Commissioner will accept written comments transmitted by e-mail provided they are sent to the following e-mail address: chambersj@insurance.ca.gov. The Commissioner will also accept written comments transmitted by facsimile provided they are directed to the attention of Jennifer Chambers and sent to the following facsimile number: (415) 904-5729. **Comments sent to other e-mail addresses or other facsimile numbers will not be accepted. Comments sent by e-mail or by facsimile are subject to the deadline set forth above for written comments.**

AUTHORITY AND REFERENCE

The regulation will implement, interpret, and/or make specific the provisions of the California Insurance Code ("C.I.C" or "Insurance Code") sections 10113.1 and 10113.2. Sections 10113.1 and 10113.2, along with section 790.10 provide the authority for this regulation.

INFORMATIVE DIGEST

Summary of Existing Law

CIC, sections 10113.1 and 10113.2 govern viatical settlements in California. A viatical settlement typically involves the sale to a third party purchaser of a life insurance policy upon the life of a person with a “catastrophic or life threatening illness.” The policy owner will receive compensation for the policy in exchange for a transfer or assignment of the policy to the purchaser. (See CIC, section 10113.1(a)(1).)

Existing law describes licensing requirements for transacting viatical settlements in California. Specifically, a person wishing to transact a viatical settlement must apply for a license, and the Commissioner can refuse to issue a license, whenever to do so would be “contrary to the interests of the public.” (CIC, section 10113.2(b).) Existing law, in addition, prescribes general procedures for revoking or suspending a viatical settlement license. (CIC, section 10113.2(b)(2).)

In addition, existing law prescribes procedures for approval of all viatical settlement forms. (CIC, section 10113.2(c)), as well as prescribes key disclosures that must be made to a viator prior to the sale of his or her life insurance policy. (CIC, section 10113.2(d).) Existing law also describes the Commissioner’s investigatory and examination powers over those transacting viatical settlement business in California (CIC, sections 10113.2(g) and (h)), power to issue cease and desist order as well as issue monetary penalties (CIC, sections 10113.2(i) and (j).)

Policy Statement Overview

The proposed regulations are designed to clarify the viatical settlement statutes, and provide helpful guidelines on, for example, what constitutes a catastrophic or life threatening illness, among other key definitions. The proposed regulations also contain provisions designed to protect the viator, including the requirement of key disclosures in writing to be made at the time an offer is made to the viator, as well as the requirement of an escrow account. Finally, the proposed regulations are designed to enhance the Commissioner’s ability to enforce the viatical statute’s licensing requirements, by providing specific grounds for the denial or revocation of such license, as well as clarifying that a provider cannot transfer to any nonlicensed third party any legal interest in a viatical settlement.

Effect of Proposed Action

Existing law found at CIC sections 10113.1 and 10113.2, while providing a strong framework for the regulation of the viatical market in California, could benefit by clarification of key provisions of the law. For example, in order for the Commissioner to regulate a transaction involving a viatical settlement, the viator must have a “catastrophic or life threatening medical condition.” (CIC, section 10113.1(a)(1).) The code, however, does not define catastrophic or life threatening. Valuable staff time of the Department is

spent in helping individuals determine whether or not a particular medical condition meets the statutory criteria, and therefore requires for the individuals involved in the transaction to be licensed.

Similarly, the proposed regulation contains important definitions of other words that the viatical settlement statute fails to define, including “entering into,” as the phrase is used in CIC, section 10113.1(a)(1). It has been the Commissioner’s long standing interpretation of CIC, section 10113.1(a)(1) that “entering into” a viatical settlement includes not simply the original transaction between the viator and the viatical settlement provider, but also encompasses any subsequent or contemporaneous transfers to third party investors or purchasers. Section 2548.2(b) provides an important clarification of the Commissioner’s consistent interpretation of this provision. The proposed regulation also clarifies that an interest in a viaticated life insurance policy cannot be transferred to any third party that is not licensed by the Commissioner; nor can it be transferred without first obtaining the viator’s written consent. (Section 2548.3.)

Insurance Code, section 10113.2 provides that any person entering into or soliciting viatical settlements must be licensed. The proposed regulations, at section 2548.2(d) also provide an important definition of “soliciting.” Consistent with the Department’s long-standing interpretation, the latter includes offering viatical settlements or viatical settlement investments to any person in the state, and requires the licensure of viatical settlement investment brokers. Similarly, the proposed regulations, at sections 10113.2(f) and (h) contain important definitions of “viatical settlement broker” and viatical settlement provider, terms that are also not defined in the viatical settlement statutes.

CIC, section 10113.2(d) identifies disclosures that must be made to a viator at the time of the solicitation of a viatical settlement. The disclosures contained in section 2548.5 of the proposed regulations expand upon the Insurance Code provisions, and provide a list of disclosures that must be made in writing at the critical time an offer is being made to a viator. Such disclosures include the affiliation, if any, between the viatical settlement provider and broker and issuer of the insurance policy, and the affiliation, if any between the viatical settlement provider and the broker. The disclosures also require, in part, for the broker to disclose the amount of commission to be earned on the viatical settlement. In addition, proposed section 2548.6 requires the establishment of an escrow account.

CIC, section 10113.2(b)(2) allows the commissioner to revoke a person’s license following a hearing at which it is determined that to keep such license would be “contrary to the interests of the public.” Proposed section 2548.7 prescribes various practices that are prohibited by a viatical settlement licensee, thereby offering guidance as what types of conduct is deemed by the commissioner to present a conflict of interest, and to be otherwise “contrary to the interests of the public.” Section 2548.7(g) imposes a five-year records retention requirement. Proposed section 2548.8 offers critical guidance as to what constitutes grounds for revocation of licensure.

PUBLIC DISCUSSIONS OF PROPOSED REGULATIONS

Pursuant to Government Code, section 11345.45, the Department mailed an Invitation to Prenotice Public Discussions to industry, regulatory and consumer group representatives. Subsequently, the Department held a one-day workshop in order to receive comments about the proposed regulation. Input from workshop participants was taken into account in the formulation of the proposed regulations.

MANDATES ON LOCAL AGENCIES OR SCHOOL DISTRICTS

This proposed regulation does not impose any mandate on local agencies or school districts. There are no costs to any local agency or school district for which Part 7 (commencing with Section 17500) of Division 4 of the Government Code would require reimbursement.

COST OR SAVINGS TO STATE AGENCY OR SCHOOL DISTRICT IN FEDERAL FUNDING

The Commissioner has determined that the proposed regulations will result in no cost or savings to any state agency, no cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code, no other nondiscretionary cost or savings imposed on local agencies, and no cost or savings in federal funding to the State.

ECONOMIC IMPACT ON BUSINESSES AND THE ABILITY OF CALIFORNIA BUSINESS TO COMPETE

The Commissioner has made the initial determination that the proposed regulations may have a significant, statewide adverse economic impact directly affecting business, including the ability of California business to compete with businesses in other states. The types of business impacted will be viatical settlement brokers and providers, and adverse economic impacts include the requirement for licensees to open an escrow account, and to prepare written disclosures at the time an offer is made to a viator, and to comply with a five-year records retention requirement. There may also be adverse economic impacts associated with the proposed regulation's clarification that licensees cannot transfer an ownership interest in a viatical settlement contract without having the entity to which the interest is transferred itself be licensed. To the extent that some licensees may currently be transferring such interests, the statute's clarification in this regard will reveal the unlawfulness of such activity and require a modification to such licensees' business plans. Finally, there could be an adverse economic impact in requiring viatical settlement brokers to disclose the amount of their commissions. It is possible that when prospective viators learn of the amount of commission to be received by a broker, they may wish to pursue more competitive offers.

The Commissioner has not considered proposed alternatives that would lessen any adverse economic impact on business and invites interested parties to submit proposals. Submissions may include the following considerations:

- (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to businesses.
- (ii) Consolidation or simplification of compliance and reporting requirements for businesses.
- (iii) The use of performance standards rather than prescriptive standards.
- (iv) Exemption or partial exemption from the regulatory requirements for businesses.

POTENTIAL COST IMPACT ON PRIVATE PERSONS OR BUSINESSES

The Commissioner has identified the following potential cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action: the cost of maintaining an escrow account, storing documents for five years and printing information required on the proposed regulation's disclosures to the viator. In addition, some licensees may be required to modify their business plans to ensure that they are not allowing the transfer of an interest in a viaticated insurance policy to a third party that is not licensed as a viatical settlement provider.

FINDING OF NECESSITY

The Commissioner finds that it is necessary for the welfare of the people of the state that the regulations apply to businesses.

EFFECT ON JOBS AND BUSINESSES IN CALIFORNIA

The Commissioner is required to assess any impact the regulations may have on the creation or elimination of jobs in the State of California, the creation of new businesses, the elimination of new businesses, and the expansion of businesses currently operating in the state. The Commissioner does not foresee that the proposed regulations will have any impact on any of the above but invites interested parties to comment on this issue.

IMPACT ON HOUSING COSTS

The matters proposed herein will have no significant effect on housing costs.

ALTERNATIVES

The Commissioner must determine that no reasonable alternative considered by the Commissioner or that has otherwise been identified and brought to the attention of the Commissioner would be more effective in carrying out the purposes for which the regulations are proposed or would be as effective and less burdensome to affected private persons than the proposed action. To date, no reasonable alternative to the proposed regulations is apparent. The Commissioner, however, invites public comment on alternatives to the regulation.

IMPACT ON SMALL BUSINESS

The proposed regulation will impact small business to the extent that viatical settlement licensees will be required to open an escrow account, retain records of transactions for five years, and provide written disclosures at the time an offer is made to a viator. There may also be some impact associated with the Commissioner clarifying that licensees cannot transfer any interest in a viatical settlement to a third party that is not licensed, and brokers must disclose their commissions to prospective viators. The proposed regulations are likely to exert a positive impact on small business by helping to clean up business practices that could be detrimental to the consumer, thereby enhancing consumer confidence in the viatical settlement industry.

COMPARABLE FEDERAL LAW

There are no existing federal regulations or statutes comparable to the proposed regulations.

TEXT OF REGULATIONS AND INITIAL STATEMENT OF REASONS

The Department has prepared an initial statement of reasons that sets forth the reasons for the proposed regulations. The Commissioner also has available all the information upon which this proposed action is based. Upon request, the initial statement of reasons will be made available for inspection and copying. Requests for the initial statement of reasons or questions regarding this proceeding should be directed to the contact person listed above. Upon request, the final statement of reasons will be made available for inspection and copying once it has been prepared. Requests for the final statement of reasons should be directed to the contact person above.

The file for this proceeding, which includes a copy of the proposed regulations, the statement of reasons, the information upon which the proposed action is based, and any supplemental information, including any reports, documentation and other materials related to the proposed action that is contained in the rulemaking file, is available for inspection and copying **by prior appointment** at 45 Fremont Street, Floor 24, San Francisco, California, 94105, between the hours of 9:00 a.m. and 4:30 p.m., Monday through Friday.

FINAL STATEMENT OF REASONS

Upon written or e-mail request, the final statement of reasons will be made available for inspection and copying once it has been prepared. Written requests for the final statement of reasons should be directed to the contact person listed above.

AUTOMATIC MAILING

A copy of this notice, including the informative digest, which contains the general substance of the proposed regulations, will automatically be sent to all persons on the Insurance Commissioner's mailing list.

WEBSITE POSTINGS

Documents concerning this proceeding are available on the Department's website. To access them, go to <http://www.insurance.ca.gov/>. Find, near at the top of the leftmost column, the pull down menu under the heading "Quick Links." Select the "Legal Information" link. On the "Legal Information" page, click on the "Proposed Regulations" link. When the "Search or Browse for Documents for Proposed Regulations" screen appears, you may choose to find the documents either by conducting a search or by browsing for them by name. To search, enter "RH02023855" (the Department's regulation file number for these regulations) in the search field. Alternatively, search using as your search term the California Insurance Code section number of a code section that the regulations implement (for instance, "10113.1"), or search by keyword ("viatical settlement," for example) Then, click on the "Submit" button to display links to the various filing documents.

To browse, click on the "Browse All Regulations" button near the bottom of the screen. A list of the names of regulations for which documents are posted will appear. Find in the list the "Viatical Settlement Regulation" link, and click it. Links to the documents associated with these regulations will then be displayed.

AVAILABILITY OF MODIFIED TEXT OF REGULATIONS

If the regulations adopted by the Department differ from those which have originally been made available, but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of adoption. Interested persons should request a copy of these regulations prior to the adoption from the contact person listed above.